NO. 89-1690

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES STEVEN ACEVEDO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
RICHARD B. IGLEHART,
Chief Assistant Attorney
General
HARLEY D. MAYFIELD, Senior
Assistant Attorney General
FREDERICK R. MILLAR JR.,
Supervising
Deputy Attorney General
ROBERT M. FOSTER, Supervising
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7852

Attorneys for Petitioner

QUESTIONS PRESENTED

1. The issue presented in this petition is the exact question that this Court deadlocked on in *Oklahoma* v. *Castleberry*, 471 U.S. 146, (1985), namely, whether, under the Fourth Amendment principles set forth in *United States* v. *Ross*, 456 U.S. 798, (1982), when an officer has probable cause to believe that there is contraband in a specific container within a vehicle, is he required to obtain a search warrant for that container or may he search the container for contraband without a warrant?

2. Did this Court's decision in *United States* v. *Ross*, *supra*, overrule or limit *United States* v. *Chadwick*, 433 U.S. 1, (1977)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTORITIES CONT.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES STEVEN ACEVEDO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three, issued on December 12, 1989.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District,

Division Three is reported at 216 Cal.App.3d 586 and 265 California Reporter 23 and appears as Appendix A (pages A-1 through A-21).

The first order modifying the concurring opinion is also reported at 216 Cal.App.3d 586 and 265 California Reporter 23 and appears as Appendix B (pages A-23 through A-25).

The first order modifying the majority opinion is also reported at 216 Cal.App.3d 586 and 265 California Reporter 23 and appears as Appendix C (pages A-27 through A-28).

The second order modifying the concurring opinion is also reported at 216 Cal.App.3d 586 and 265 California Reporter 23 and appears as Appendix D (pages A-30 through A-31).

The order of the Supreme Court of California denying Petitioner's petition for review on direct appeal was entered in

the Official Minutes of that court and reported in the Official Advance Sheets of the California Supreme Court. The minute entry is reproduced in Appendix E at page A-33.

JURISDICTION

Petitioner invokes the jurisdiction of this Court, under Title 28, United States Code, section 1257(3) to review a judgment of the California Court of Appeal, Fourth Appellate District, Division Three which was entered on December 12, 1989. The California Supreme Court denied review in this case on March 15, 1990. The present petition for writ of certiorari is filed within the required 90 day period following the final entry of judgment. The judgment of the Court of Appeal became final for the purposes of this Court with the denial of review by the California Supreme Court on March 15, 1990. (*Market Street Railroad*

Co. v. *Railroad Commission*, 324 U.S. 548, 550-552, (1944). Thus, the instant judgment is a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

In an information filed by the District Attorney of Orange County, California, on June 24, 1988, respondent and a co-defendant were charged with one count of possession of marijuana for sale

in violation of California Health and Safety Code section 11359. (CT 2.)[1/]

On this same date respondent was arraigned in the Orange County Superior Court and entered a plea of not guilty to the charges. (CT 1.) Respondent's motions to suppress evidence pursuant to California Penal Code sections 995 and 1538.5 were heard and denied on October 7, 1988. (CT 77.)

On October 12, 1988, as part of a plea bargain, the information was amended to add a second count of possession for sale in violation of California Health and Safety Code section 11357, subdivision (c). Respondent then entered a plea of guilty to both counts. (CT 78; RT 40-41.)

---

1. "CT" refers to the Clerk's Transcript of the trial court's documents and orders. "RT" refers to the reporter's transcript of the trial court proceedings. Both documents were included as part of the official record before the California Court of Appeal and California Supreme Court.

On this same date, respondent was granted probation on certain terms and conditions including 30 days in custody and a $100 fine. (CT 79.)

Respondent's notice of appeal was filed on November 10, 1988. (CT 83.) In a published decision filed on December 12, 1989, the Court of Appeal, Fourth Appellate District, Division Three, reversed with directions the judgment of the Superior Court and held that the search of the paper bag was illegal. (App. A.) Modifications to the opinion that did not change the result were issued on December 20 and 29, 1989, and January 3, 1990. (Apps. B, C and D.) On March 15, 1990, the California Supreme Court denied petitioner's petition for direct review. (App. E.)

HOW THE FEDERAL QUESTION IS PRESENTED

In the Orange County, California Superior Court, respondent moved to

suppress evidence on the ground that the paper bag found in the trunk of his car was improperly searched under the Fourth Amendment without a warrant. (CT 49-53.) The trial court denied the motion to suppress evidence. (CT 77.)

The California Court of Appeal, Fourth Appellate District, Division Three, concluded that the search of the paper bag without a search warrant violated the Fourth Amendment to the United States Constitution. (App. A, B, C, D.)

Petitioner filed a petition for review arguing that respondent's Fourth Amendment rights had not been violated because the search of the entire car, including the paper bag, was justified under *United States* v. *Ross*, *supra*, 456 U.S. 798. The California Supreme Court denied petitioner's request for review. Justice Pannelli dissented, believing that review should have been granted.

STATEMENT OF FACTS

On October 28, 1987, Investigator Don Coleman of the Santa Ana Police Department received a telephone call from United States Drug Enforcement Agent John McCarthy from Hawaii. Agent McCarthy informed Investigator Coleman that Agent McCarthy had seized a package containing a picnic cooler. Inside the cooler the agent had found nine clear bags of marijuana. The bags were approximately 12" by 4" by 3" and each contained about two pounds of marijuana. The package was addressed to a J.R. Daza at 805 West Stevens Avenue, Santa Ana, California. The package was to have been sent to the Federal Express Office at 700 East Alton in Santa Ana. McCarthy told Coleman that instead the agent would send the package to Coleman. The intent of the officers was to arrest the person who picked up the marijuana. (CT 64, 71; RT 20.)

McCarthy sent the package to Coleman who received it on October 29, 1988. Coleman opened the package and found the marijuana in the manner Agent McCarthy had described. Investigator Coleman repackaged the box. He then contacted Mike Cole, the senior operations manager at the Federal Express Office. Coleman told Cole that Coleman wanted to leave the package at Federal Express and then arrest the person who picked it up. Cole took the package and kept it under lock. (CT 64, 71; RT 20.)

The next day, Investigator Coleman went back to the Federal Express Office. He examined the package containing marijuana. The package was still under lock. It had not been tampered with. The wrapping was the same. A small mark Coleman had placed on the package was still there. (CT 64, 71; RT 20.)

A telephone number, apparently on the delivery instructions from the shipper, was checked through the Santa Ana Police Department facilities and found to belong to a Jamie R. Daza at 807 West Stevens, Apartment #12 in Santa Ana. A check of Daza's California driver's license confirmed this same address. At about 10:30 a.m., a man who identified himself as Jamie Daza went to the Federal Express Office and picked up the package. Daza placed the package in his car and drove to his apartment on West Stevens. He carried the package into the apartment. (CT 64, 71; RT 20.)

Around 11:45 a.m., surveilling officers saw Daza exit his apartment and drop the paper and box that had contained the marijuana into a trash bin. (CT 65; RT 3.) At this time Investigator Coleman left the scene to get a search warrant. (CT 65; RT 3.)

Around 12:10 p.m., co-defendant St. George was seen by officers exiting the residence wearing a blue knapsack. The knapsack appeared to be half full. Fearing the loss of evidence, the officers stopped and detained him after he had left the apartment as he tried to drive out of the complex. The knapsack was searched and one and one-half pounds of marijuana was found. (RT 4; CT 65.)

Around 12:30 p.m., respondent arrived at the scene. He walked to apartment 12 and entered. Respondent had nothing in his hands. He exited about ten minutes later carrying a brown lunch bag that appeared to be full and about the appropriate size of the wrapped marijuana packages that Agent McCarthy had seen. Respondent was then observed to leave the apartment and walk to a silver Honda in the parking lot. He placed the brown lunch bag in the trunk of the Honda and

then attempted to leave. In order to prevent the possible loss of evidence from the apartment under surveillance, respondent's car was stopped by a marked police car. The trunk was opened, as was the bag, and inside the brown bag the officers found one-quarter to one-half pound of marijuana. (CT 65.)

The search warrant issued at 12:40 p.m. (See People's Exh. A at the suppression hearing.) Shortly thereafter, Investigator Coleman returned with the search warrant. The apartment was searched and numerous bags of marijuana were found. (CT 71, 74.)

ARGUMENT

I

THE SEARCH OF THE PAPER LUNCH BAG IN THE TRUNK OF THE VEHICLE WAS JUSTIFIED UNDER THE AUTOMOBILE EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT

The California Court of Appeal held that the officers illegally searched the paper lunch bag found in the trunk of the car, holding that the search fell within the dictates of *Arkansas* v. *Sanders*, 442 U.S. 753, (1979), and *United States* v. *Chadwick*, 433 U.S. 1, (1977), rather than those of *United States* v. *Ross*, 456 U.S. 798, (1982). The pertinent part of the ruling is summarized by the following quotation:

> "`If the officer has probable cause to believe there is contraband somewhere in the car, but he does not know exactly where, he may search the entire car as well as any containers found therein. [Citations.] If, on the other hand, the officer only has probable cause to believe there is contraband in a specific container in the

> car, he must detain the container and delay his search until a search warrant is obtained. [Citations]'" (*People* v. *Acevedo*, 216 Cal.App.3d 586, 591-592 (1989), quoting from *Castleberry* v. *State*, 678 P.2d 720, 724, (Okla.Crim.App. (1984).)[2]

The Court of Appeal then went on to hold that since the officers had particularized probable cause to believe that there was contraband in a particular location, in this case the paper lunch bag, rather than generalized probable cause that there was contraband somewhere in the vehicle, the officers were required to obtain a search warrant before opening the closed paper lunch bag. (*People* v.

---

2. The decision of the Oklahoma court was taken to this Court in *Oklahoma* v. *Castleberry*, 471 U.S. 146, (1985). This Court granted certiorari but Justice Powell disqualified himself from the case. After oral argument the remaining eight justices deadlocked on the question presented. This case presents the exact question that the Court could not resolve in *Castleberry*.

Acevedo, *supra*, 216 Cal.App.3d at pp. 592-593.)

Respondent contends that the ruling of the Court of Appeal is at odds with the holding of this Court in *United States* v. *Ross*, *supra*. In *Ross*, this Court specifically held that once probable cause exists to believe that a vehicle contains contraband the entire vehicle may be searched without a warrant and the "scope of a warrantless search based on probable cause is no narrower--and no broader--than the scope of a search authorized by a warrant supported by probable cause." (*United States* v. *Ross*, *supra*, 456 U.S. at p. 823.)

Respondent submits that the holding of the Court of Appeal conflicts not only with *Ross*, but also with Fourth Amendment law with regard to the automobile exception to the general rule requiring a search warrant. (Cf. *Colorado* v.

Bannister, 449 U.S. 1, (1980); *Texas* v. *White*, 423 U.S. 67, (1975); *Chambers* v. *Maroney*, 399 U.S. 42, (1970); *Carroll* v. *United States*, 267 U.S. 132, (1925).)

The clear holding in *Ross* is that if "probable cause justifies the search of a lawfully stopped vehicle, it justified the search of every part of the vehicle and its contents that may conceal the object of the search." (*United States* v. *Ross*, *supra*, 456 U.S. at p. 825.) *Ross* stems from this Court's earlier automobile exception cases. Those cases recognized that the unique mobility of a motor vehicle gave rise to exigent circumstances justifying a search without a warrant. (*Carroll* v. *United States*, *supra*, 267 U.S. 132 at pp. 151-154; *United States* v. *Ross*, *supra*, at pp. 818-820.) What the Court of Appeal failed to recognize in the case at bar is once the bag was placed in the automobile, it acquired the same degree of

mobility as the vehicle itself. Respondent's independent and intentional action of placing the bag in the car showed an intent to move the bag from its original location. His driving of the car was the precise mobility that justified the searches in *Ross* and *Carroll*. Given such a clear demonstration of mobility, the exigent circumstances of mobility encompassed the bag itself and no search warrant was required.

> "The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance." (*United States* v. *Ross*, *supra*, 456 U.S. at p. 809.)

Moreover, the holding in the case at bar is premised on the privacy expectation that attaches to a closed container. (*People* v. *Acevedo*, *supra*, 216 Cal.App.3d at p. 590, citing to *United States* v. *Chadwick*, *supra*, 433 U.S. 1.) But this

Court has already rejected the concept that such an expectation of privacy standard has greater sway than the earlier inherent mobility-exigent circumstances standard. In *California* v. *Carney*, 471 U.S. 386, 393, (1985), this Court rejected a claim that the expectation of privacy surrounding the residency aspects of a motor home superseded the exigencies created by the mobility of the motor home. The potential mobility of the motor home was dispositive. (*Id.* at p. 393.) Since the mobility factor is paramount, it should have been similarly dispositive in the case at bar and fully justified the search of the paper lunch bag.

It is not rational to make the distinction between whether a search warrant should be obtained based upon whether or not the officers had sufficient knowledge that the contraband was in a specific container in a specific part of

the vehicle as opposed to being in the vehicle generally. As Professor LaFave has noted, such a holding would mean that police officers may actually be able to broaden their power to make warrantless searches by limiting their accumulation of probable cause. (LaFave, *Search and Seizure*, Second Edition, Section 7.2(d), page 58 (1987).) Indeed, even the California Court of Appeal recognized the "anomalous nature of the *Ross-Chadwick* dichotomy. . . ." The court noted that it was creating an "incentive for police officers to withhold evidence related to probable cause in order to fit within the more generous confines of *Ross*." (*People* v. *Acevedo*, *supra*, 216 Cal.App.3d at p. 592.) The purpose of the exclusionary rule is to encourage future police conformance with the dictates of the Fourth Amendment, not to reward them for creative avoidance. Yet the holding in

the case at bar is admittedly at odds with the goal of encouraging compliance with the letter and spirit of the Fourth Amendment.

Such a rule not only flies in the face of logic but is also clearly contrary to the stated desire of this Court to formulate straightforward, workable rules regarding the searches of vehicles to allow the police to make proper decisions regarding the search of vehicles. (*United States* v. *Belton*, 453 U.S. 454, 458, (1981).) This Court has held that a "`single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" (*United States* v. *Belton*, *supra*, at p. 458, quoting *Dunaway* v. *New York*, 442 U.S. 200, 213-214, (1979).) The need for

straightforward and predictable rules is in the interest of both the police and the citizens who may be subjected to police activity. (*United States* v. *Belton*, *supra*, 453 U.S. at pp. 459-460.)

The rule formulated in *Ross* is clear, logical and should be applied to the situation in the case at bar. A rule requiring a warrant when there is particularized probable cause will further cloud what this Court described in *Ross* as "this troubled area." (*United States* v. *Ross*, *supra*, 456 U.S. at p. 817.) Instead of the straightforward rule of *Ross* which looks to the overall existence of probable cause to search the vehicle and its contents, endless litigation over whether the officer knew of the location and container of the contraband will be inevitable. A far more workable rule is the holding in *Ross* that if "probable cause justifies the search of a lawfully

stopped vehicle, it justified the search of every part of the vehicle and its contents that may conceal the object of the search." (*United States* v. *Ross*, *supra*, 456 U.S. at p. 825.) Such a rule establishes the type of "bright line" this Court has sought to assist peace officers in their difficult tasks.[3/] Thus, this Court's earlier decision in *United States* v. *Chadwick*, *supra*, 433 U.S. 1, should be held to have been overruled by *Ross* in situations such as the one in the case at bar.

Moreover, the holding in the case at bar creates severe difficulties for peace officers in the performance of their duties. In a situation where officers have sufficient justification to stop a

---

3. Of course, the fact that at the actual moment of the search the car and hence the bag were immobile is irrelevant since it is the potential for mobility that controls. (*Michigan* v. *Thomas*, 458 U.S. 259, 261, (1982); *per curiam*.)

car for transporting narcotics in a particular container within a vehicle, what are the officers to do with the citizens while they go through the often lengthy and laborious task of obtaining a warrant? The probable cause needed for arrest is inside the bag and the bag cannot be legally opened. The officer might detain the citizens but a detention of such length at some point becomes an arrest. (*Florida* v. *Royer*, 460 U.S. 491, 501-502, (1983).) Thus while the officers are trying to obtain a warrant they may run the very real risk of inadvertently arresting a citizen before the contraband is found. Thus, compliance with the rule espoused by the Court of Appeal in this case may result in the officers making arrests. A far better rule would be to hold that such containers come with the holding in *Ross*. Thus officers could quickly resolve the situation, promptly

arresting criminals while speedily allowing law abiding citizens to proceed on their way. The rule created by the Court of Appeal will ensnare officers and citizens in time consuming and unnecessary waits to procure warrants.

Since the facts of this case reveal there was probable cause to believe respondent's car contained contraband, the rationale of *United States* v. *Ross, supra,* should apply. When the closed container was placed into the car by the respondent, it became as moveable as the car and thus the exigent circumstances covering the car applied to the paper lunch bag as well. Thus, the Court of Appeal erred in failing to uphold the search of the paper lunch bag without a warrant.

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

JOHN K. VAN DE KAMP
Attorney General of
the State of California
ROBERT M. FOSTER,
Supervising Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101

No:
October Term, 1989

THE STATE OF CALIFORNIA,
Petitioner,

v.

CHARLES STEVEN ACEVEDO,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI AND APPENDICIES as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty-one (41) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Theodore A. Cohen
433 N. Camden Drive, Ste. 900
Beverly Hills, CA 90210

District Attorney
Orange County
P.O. Box 808
Santa Ana, CA 92701

Court of Appeal
Fourth Appellate District
Division Three
925 No. Spurgeon
Santa Ana, CA 92702

California Supreme Court
350 McAllister Street, Room 4250
San Francisco, CA 94102

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 27th day of April, 1990.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, April 27, 1990.

Robin Dunham
ROBIN DUNHAM

Subscribed and sworn to before me
this 27th day of April 1990.

Anne Marie Buford
Notary Public in and for said County and State

ANNE MARIE BUFORD
Notary Public—California
County of San Diego
My Commission Expires 11/19/93